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No. 84-1867

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MARY L. GILLIES,
Petitioner,

v.

GEORGE DELOZIER, JR., *et al.*,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF RESPONDENTS S.L. NUSBAUM & CO., INC. AND ST. MARY'S SQUARE MERCHANTS ASSOCIATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. Did the Court of Appeals properly rule that petitioner's claim under 42 U.S.C. § 1983 fails because she has not alleged a deprivation of a right protected by the Constitution or laws of the United States.

II. Did the Court of Appeals properly rule that petitioner's claim under 42 U.S.C. § 1985 fails because she has not alleged any facts supporting her conclusory allegations that the defendants conspired to deprive her of the equal protection of the laws and equal privileges and immunities under the laws.

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The respondents S.L. Nusbaum & Co., Inc., and St. Mary's Square Merchants Association respectfully request that this Court deny the petition for a writ of certiorari seeking review of the opinion of the Court of Appeals for the Fourth Circuit in this case. That opinion is set forth at Pet. App. 16a-20a.

COUNTER-STATEMENT OF THE CASE

On September 4, 1982, the petitioner Mary Gillies, visited a shopping center, known as St. Mary's Square,

in St. Mary's County, Maryland, which was then allegedly owned by defendant, S.L. Nusbaum Company, Inc. ("Nusbaum"). The merchants, businesses and retail lessees operating at the shopping center had formed an unincorporated association under the name of St. Mary's Square Marchant's Association ("Merchants"). Defendants Eugene Crawford and Virginia Crawford were hired to exhibit an ultralight aircraft in the shopping center parking lot for promotional purposes.

At approximately 7:00 p.m., defendants Delozier and Gibson, both of whom were deputies with the Sheriff's Department of St. Mary's County, allegedly blocked off vehicular and pedestrian traffic to enable the ultralight, operated by defendant Eugene Crawford, to take off. While attempting to take off, the ultralight struck a light pole, the impact of which caused the aircraft to falter and strike the petitioner, a bystander.

Petitioner filed suit for personal injuries in the District Court for the District of Maryland alleging that (1) the deputies, Delozier and Gibson, had acted under color of state law to deprive her of her civil rights pursuant to 42 U.S.C. § 1983; (2) all defendants had conspired to violate her civil rights pursuant to 42 U.S.C. § 1985; and (3) that all defendants had neglected to prevent the conspiracy pursuant to 42 U.S.C. § 1986.

All defendants filed motions to dismiss pursuant to Fed. R. Civ. P. 12(b) asserting that the plaintiff had failed to state a claim upon which relief could be granted and that the court was without subject matter jurisdiction. By Memorandum and Order filed on

August 5, 1983, the trial court granted the motions of all defendants.

Petitioner appealed to the Fourth Circuit which affirmed the Trial Court in a *per curiam* decision rendered on March 6, 1985.

REASONS FOR DENYING THE WRIT

In the first instance, this case presents a straightforward question of whether the personal injury alleged here amounts to a loss of liberty under the Fourteenth Amendment or the deprivation of a right protected by the Constitution or laws of the United States which would give rise to an action under 42 U.S.C. § 1983.

The second issue involves whether the petitioner has set forth a claim under 42 U.S.C. § 1985(3) which gives rise to civil liability against persons who conspire to deprive another person or class of persons of "the equal protection of the laws or of equal privileges and immunities under the laws". The resolution of this issue necessarily disposes of the third issue, the claim under § 1986, as § 1986 is purely derivative of § 1985.

I. Petitioner's Claim Under 42 U.S.C. § 1983 Fails as She Has Not Alleged a Deprivation of a Right Protected by the Constitution or Laws of the United States.

The § 1983 action lies only against the deputy sheriffs, Delozier and Gibson, and the respondents Nusbaum and Merchants will not address the applicability of that section in this brief. To the extent that a response is required by the Court these respondents would rely upon the *per curiam* opinion of the Fourth

Circuit (Pet. App. 16a-20a), the Memorandum Opinion and Order of the District Court (Ramsey, J.) (Pet App. 2a-15a) and the brief of respondents Delozier and Gibson.

II. Petitioner's Claim Under 42 U.S.C. § 1985(3) Fails Because She Has Not Alleged Any Facts Supporting Her Conclusory Allegations That the Defendants Conspired To Deprive Her of the Equal Protection of the Laws and Equal Privileges and Immunities Under the Laws.

At the outset respondents are constrained to observe that petitioner has evidently abandoned her appellate efforts with regard to § 1985 as she does not address this claim in her Petition which is devoted entirely to her § 1983 claim. Although the petitioner has waived by omission what she is reluctant to waive by expression, these respondents would address the § 1985 issue briefly.

In justifying her § 1985(3) claim, petitioner alleges that all the defendants did "combine, scheme, confederate and conspire together with the specific intent to conspire for the common design and purpose of depriving, directly or indirectly, the plaintiff and all citizens then and there, of the equal protection of the laws and the equal privileges and immunities under the law".

An action under 42 U.S.C. § 1985(3) creates civil liability against any persons who conspire to deprive another person or class of persons of "the equal protection of the laws or of equal privileges and immunities under the laws." While the statute extends to both public and private action, respondents submit

that neither intent by the Congress, nor interpretation by the Courts, has given rise to a general federal tort law. The statute was simply not intended to apply to all tortious, conspiratorial interferences with the rights of others.

> The constitutional shoals that would lie in the path of interpreting § 1985(3) as a general federal tort law can be avoided by giving full effect to the congressional purpose—by requiring, as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment. . . . The language requiring intent to deprive of equal protection, or equal privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all. *Griffin* v. *Breckenridge,* 403 U.S. 88, 102 (footnotes omitted).

In the present case Gillies has failed to state an actionable claim under § 1985(3) as she has not alleged any facts supporting her conclusory allegations that the defendants conspired to deprive her of the equal protection of the laws or equal privileges and immunities under the laws, nor has she alleged that the actions of the defendants were aimed at an identifiable, protected class of which she was a member.

Once petitioner's claim under § 1985 falls, so must her claim under 42 U.S.C. § 1986 because it is derivative of § 1985. A failure to state a claim under § 1985 necessarily precludes any action under § 1986.

CONCLUSION

The facts here at best suggest that one or more of the defendants was negligent in some fashion and that as a consequence of such negligence, the plaintiff suffered injuries. Notwithstanding plaintiff's bald allegations of constitutional deprivation, conspiracy and discrimination, it is obvious that this action is one in tort which is governed by the laws of the State of Maryland and should be litigated, if at all, in state court.

Respondents respectfully request that this Court deny the petition for a writ of certiorari.

Respectfully submitted,

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